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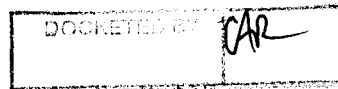
**BEFORE THE ARIZONA CORPORATION COMMISSION**

MARC SPITZER  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
WILLIAM A. MUNDELL  
COMMISSIONER  
MIKE GLEASON  
COMMISSIONER  
JEFF HATCH-MILLER  
COMMISSIONER

Arizona Corporation Commission

**DOCKETED**

APR 18 2003



AZ CORP COMMISSION  
DOCKET CONTROL

IN THE MATTER OF THE )  
APPLICATIONS OF H2O, INC. AND )  
JOHNSON UTILITIES COMPANY FOR )  
AN EXTENSION OF THEIR )  
CERTIFICATES OF CONVENIENCE AND )  
NECESSITY. )

**DOCKET NOS. W-02234A-00-0371  
WS-02987A-99-0583**

IN THE MATTER OF THE APPLICATION )  
OF JOHNSON UTILITIES, L.L.C., DBA )  
JOHNSON UTILITIES COMPANY, FOR )  
AN EXTENSION OF ITS CERTIFICATE )  
OF CONVENIENCE AND NECESSITY TO )  
PROVIDE WATER AND WASTEWATER )  
SERVICE TO THE PUBLIC IN THE )  
DESCRIBED AREA IN PINAL COUNTY, )  
ARIZONA. )

**DOCKET NO. WS-02987A-00-0618**

IN THE MATTER OF THE APPLICATION )  
OF DIVERSIFIED WATER UTILITIES, )  
INC. TO EXTEND ITS CERTIFICATE OF )  
CONVENIENCE AND NECESSITY. )

**DOCKET NO. W-02859A-00-0774**

IN THE MATTER OF THE APPLICATION )  
OF QUEEN CREEK WATER COMPANY )  
TO EXTEND ITS CERTIFICATE OF )  
CONVENIENCE AND NECESSITY. )

**DOCKET NO. W-01395A-00-0784**

**DIVERSIFIED WATER UTILITIES, INC.'S  
MOTION TO LIMIT COMMISSION CONSIDERATION TO ITEMS RAISED  
BY JOHNSON UTILITIES LLC'S APPLICATION FOR RETROACTIVE  
EXTENSION OF TIME TO COMPLY**

1 Diversified Water Utilities, Inc. ("Diversified"), through its attorneys,  
2 hereby files its Motion to Limit Commission Consideration to Items Raised in Johnson  
3 Utilities LLC's ("JUL") Application for Retroactive Extension of Time to Comply  
4 ("Application").

5 **JUL'S APPLICATION ONLY MENTIONS THE CONSENT JUDGMENT**  
6 **AND DOES NOT GIVE NOTICE OF ANY "DEVELOPER EMERGENCY."**

7 During the Open Meeting held on April 1, 2003, the Commission expressed  
8 a legitimate concern that the due process rights of all interested parties be protected. It  
9 then appropriately delayed consideration of JUL's Application when it became evident  
10 that it was unlikely that all parties had received the Application in time to respond if they  
11 so desired. However, due process requires more than just receipt of a pleading. As the  
12 Arizona Supreme Court emphasized in *Matter of Rights to Use Gila River*, 171 Ariz. 230,  
13 237-238, 830 P.2d 442, 449-450 (1992):  
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15 "Due Process also requires that the notice 'be of such  
16 nature as reasonably to convey the required information.'  
17 That is, the content of the notice must be sufficient to  
18 'apprise interested parties of the pendency of the action'  
19 and to make them aware of the 'opportunity to present  
20 their objections.'" citing, *Mullane v. Central Hanover*  
*Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657  
(1950).

21 JUL's Application constitutes the only notice provided to the parties of the  
22 nature of the action. Therein JUL argues that it should be given a retroactive extension to  
23 comply with Decision No. 64062 because it is now "prepared to sign" a Consent  
24 Judgment with the Arizona Department of Environmental Quality ("ADEQ"). This is the  
25 only justification for retroactive treatment set forth in JUL's Application. As set forth in  
26

1 Diversified's Opposition filed March 31, 2003, the dilatory nature of JUL reaching this  
2 tentative agreement with ADEQ is instructive as to JUL's willingness to comply only  
3 when forced into a corner. The belated proffering of a draft Consent Judgment does  
4 nothing to alter the fact that for the second time JUL has failed to comply with the clear  
5 mandates of Decision No. 64062.

6 Additionally, troubling is the information the fact that JUL appears to be  
7 using another irrelevant factor (i.e., developers) not even mentioned in its latest  
8 Application, to secure an amendment of Decision No. 64062. During the April 1, 2003  
9 Open Meeting, Chairman Spitzer indicated he had been approached on Thursday, March  
10 27, 2003, by several of JUL's potential "customers" who felt that it was a matter of  
11 "urgency" that JUL be allowed to resurrect its extended certificated area. He further  
12 indicated that he directed that an appropriate application be filed with the Commission.  
13 JUL's Application was filed in response thereto. At the Open Meeting, representatives of  
14 certain landowners/developers seeking to sell lands within the area previously  
15 conditionally certificated to JUL asked to speak. While the Commission limited  
16 discussion to the issue of whether the parties had received notice, these representatives  
17 attempted to argue that the lack of a certificated provider is costing them money because  
18 they are unable to close certain real estate transactions.<sup>1</sup>

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1 These statements were not made under oath. The truth thereof has never been subjected to discovery or cross-examination. In fact, there was not even a court reporter present at the open meeting to record these representations so they could be investigated later. The Arizona Supreme Court has "repeatedly held in a variety of circumstances that due process of law under the Fourteenth Amendment of the Constitution of the United States requires that there be notice of hearing, a hearing, the right to produce witnesses, examine adverse witnesses and to have a full consideration and determination according to evidence before the body with whom the hearing is held." *Southern Pacific Company v. Arizona Corporation Commission*, 98 Ariz. 339, 346-347, 404 P.2d 692, 697 (1965)(invalidating a Commission Decision ordering restoration of discontinued train service where the Commission failed to receive evidence on whether the public convenience and necessity required the service.

1           Apparently JUL intends that the Commission hear further from these  
2 landowners/developers and consider their situations in determining whether to grant a  
3 retroactive extension. But such information is not only irrelevant to the issue of whether  
4 JUL complied with Decision No. 64062, but moreover it is not within the scope of the  
5 pleading filed in this matter and no notice thereof has been provided to the parties. JUL's  
6 Application does not contain a single reference to developers/landowners or their claimed  
7 losses. No customers are identified. No lands are identified. No real estate transactions  
8 are identified. No harm to developers is alleged or specifically identified. Certainly  
9 JUL's Application does not put the parties on notice of the nature or basis of any  
10 "urgency" associated with customers, landowners or developers. In short, the Application  
11 gives no notice of the nature of the "urgency" or of the topics the various  
12 landowner/developer representatives apparently wish to present to the Commission. The  
13 "primary concern ... with notice pleading in general, is to give the opponent fair notice of  
14 the court's jurisdiction and of the nature of the claim, as well as to allow adequate  
15 opportunity to respond." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179  
16 Ariz. 185, 194, 877 P.2d 284, 293 (App. 1994). *See also, Mackey v. Spangler*, 81 Ariz.  
17 113, 115, 301 P.2d 1026, 1028 (1956) ("The purpose of [Rule 8(a)] is to avoid  
18 technicalities and give the opponent fair notice of the nature and basis of the claim and  
19 indicate generally the type of litigation involved.").

22           As noted above, the only change in circumstance alleged in the Application  
23 to support yet another request for retroactive extension, is the pending Consent Judgment.

24           As noted by Commissioner Mundell at the Open Meeting, nothing prevents JUL and  
25 ADEQ from immediately executing the Consent Judgment. Certainly the Commission's  
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1 action on the Application is not required. At this point, the parties to this proceeding are  
2 literally in the dark as to the true nature of the developers "urgency" and why the  
3 developers "urgency" is relevant to JUL's compliance with Decision No. 64062.<sup>2</sup> But  
4 even if the developers' urgency were somehow relevant to the issue before the  
5 Commission, the Application, by failing to specify the names of developers/landowners,  
6 the location of the affected property or the nature of the purported injuries, does not  
7 afford the parties a reasonable notice of these allegations or a reasonable opportunity to  
8 investigate and respond thereto.  
9

10 WHEREFORE, it is respectfully requested that, if this matter is further  
11 considered by the Commission, JUL be limited to presenting evidence on the single issue  
12 raised by its pleading—whether JUL's belated willingness to execute the Consent  
13 Judgment justifies a retroactive extension of time to comply with Decision No. 64062  
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2 Such testimony is irrelevant to the issue of whether JUL complied with Commission Decision No. 64062. As set forth in the Statement of ACC Achievement and Goals issued this year: "Underpinning all of the Commission's achievements is a focus on demanding that corporations doing business in Arizona follow the law and be held accountable when they do not. Whether it is a small water company whose management decides to cut corners on water safety ... the Commission has acted quickly, and, where appropriated levied significant penalties." However, if the Commission is going to open the matter to tangential issues like those raised by the developers/landowners at the Open Meeting, then the activities of JUL in attempting to defeat Diversified's condemnation of a much needed wellsite located within Diversified's certificated area and JUL's continuing efforts to offer water service within Diversified's certificated territory should also be examined because they are evidence of whether JUL is a fit and proper entity to hold a CC&N to this expanded territory.

1 and that JUL be precluded from discussing or presenting evidence of any nature related to  
2 the claims of developers/landowners in support of their Application.

3 Respectfully submitted this 8th day of April, 2003.

4 MARTINEZ & CURTIS, P.C.

6 

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1 PROOF OF SERVICE AND  
2 CERTIFICATE OF MAILING

3 I hereby certify that on this 8th day of April, 2003, I caused the foregoing  
4 document to be served on the Arizona Corporation Commission by hand-delivering the original  
and twenty (21) copies of said document to:

5 Docket Control  
6 Arizona Corporation Commission  
7 1200 West Washington Street  
Phoenix, Arizona 85007

8 With copies of the foregoing mailed and/or hand-delivered this 8th day of April, 2003 to:

9 Marc Stern, Administrative Law Judge  
10 Arizona Corporation Commission  
11 1200 West Washington Street  
Phoenix, Arizona 85007

12 Christopher Kempley, Chief Counsel  
13 Legal Division  
14 Arizona Corporation Commission  
15 1200 West Washington Street  
Phoenix, Arizona 85007

16 Ernest Johnson, Director  
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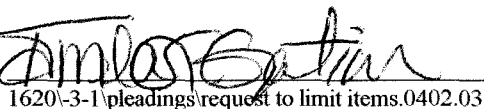
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26   
1620(-3-1) pleadings request to limit items.0402.03